Subcommittee on Interim Strong Mayor

Staff Report on the Redevelopment Agency by James Ingram

California's Community Redevelopment Law (CRL) is encompassed within Sections 33000-33855 of the State's Health and Safety Code. The City of San Diego acted in 1958 to assume the redevelopment responsibilities that California had granted by making the City Council the Redevelopment Agency board (RA). Because the Charter provided that the Mayor serve as a voting member and presiding officer for the City Council, this meant that the City's elected policymakers exercised redevelopment authority while wearing their RA hats. Acting as the City's RA, these officials established a set of bylaws in 1969, which they last amended in 1975. Under these bylaws, the RA designated the City Manager, or any other person it should designate, as its Executive Director.[1]

When San Diego voters ratified Prop F, they inadvertently removed the Mayor from the City's redevelopment process. Since the Mayor was only allowed to preside over the City Council in closed session meetings, and could not vote with that body, the Mayor could not act as part of the RA. However, Prop F did provide that the City Manager would be the Mayor's subordinate. In addition, Prop F placed most City staff in the executive branch of City government, and thus under the Mayor as CEO. The executive branch includes those working for the RA, and therefore they are under control of the CEO-Mayor.

During the Prop F transition, the City Council wrestled with the prospect that the RA's Executive Director and its City staff would report to the Mayor rather than to the City Council acting as RA.[2] The solution they adopted was to designate the Mayor as the RA's Executive Director. This was permitted because the RA's bylaws allowed the designation of someone other than the City Manager as Executive Director. Naming the Mayor to this position prevented creation of an ambiguous, dual reporting situation for both the City Manager and any City staff loaned out, contracted or partly employed by the RA.

The Subcommittee has expressed interest in institutionalizing the City's current solution to the issue of how to incorporate both the Mayor and the City Council in the redevelopment process. However, some have cautioned that the CRL preempts the city charter and that the process the RA adopted by resolution cannot be mandated within San Diego's organic law. This report addresses the issue of whether San Diego's Charter is competent to establish the Mayor as the RA's Executive Director.

There is reason to be careful in proposing charter amendments in areas where the state has acted, because these may be defined as matters of "statewide concern" rather than purely "municipal affairs." Just because an activity takes place within a city, this does not mean that it is by definition a "municipal affair." In such cases as *Johnson v. Bradley*, the courts have tried to establish a dividing line between those areas in which the state has preempted city action, and those in which municipalities are unrestrained (See *Johnson v. Bradley* 4 Cal 4th 389 (1992)). However, it is

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[1] The City Attorney's September 28, 2005 Opinion on "The Mayor's Role in the City of San Diego Redevelopment Agency Under Proposition F, the 'Strong Mayor' Form of Government" provides an excellent history of the City's Redevelopment Agency.

[2] See the August 2, 2005 Chairperson's Report to the City Council Strong Mayor-Strong Council Transition Committee on the Legal Effect of Proposition F on the City of San Diego Redevelopment Agency for a discussion of the Council's engagement with this issue.

critical to note that significant matters often remain under municipal control even in those policy arenas where the state has exercised virtually complete preemption. For example, even though California has assumed jurisdiction over the entire field of public education, the Constitution leaves to charter cities the decisions on how to elect their school boards to implement state law (*California Constitution*, Article 9, Section 16).

Now, just in case the courts were ever to overturn a single change to the city charter, it is important to include a severability clause. The courts generally attempt to excise the problematic provisions and retain those that are legitimate, yet severability should always be made explicit in charter changes that extend more than one sentence. That being a given, the staff do not agree with the contention that the San Diego Charter must remain silent on the RA and its Executive Director.

The City Attorney's Office has opined twice on this very issue. On August 4, 2005, the Office indicated that making the Mayor the Executive Director of the RA would be legal (pp. 6-8). The opinion characterized this kind of action as permissible because "the Executive Director is not authorized by the Agency bylaws to exercise any sovereign powers independently of the Agency board" (p. 7).

On September 28, 2005, the City Attorney issued another opinion on this matter, stating that "…the Board's appointment of the Executive Director is not limited by the CRL or the common law doctrine of incompatible offices, as the CRL leaves the existence of all Agency positions as well as the qualifications of any officer (other than the Board members) entirely up to the discretion of the Agency Board."(p. 9).

The second opinion concluded that the City could go farther than merely asking the RA to amend its bylaws regarding its Executive Director. According to this opinion, it would be legitimate for the charter to designate the Mayor as the RA's Executive Director: "Another more permanent solution would be to initiate a charter amendment. Because the CRL does not limit a charter city from enacting a charter provision that does not conflict with the CRL, and the CRL does not dictate what officers must be appointed by the Agency, we believe that the San Diego City Charter could be amended to require the Mayor to serve as the Executive Director of the Agency analogous to the Strong Mayor provisions that require the Mayor to serve as CEO for the City"(p. 14). The City Attorney even suggested actual charter language to accomplish this goal: "Charter section 265(b)(1) could be amended to require that the Mayor serve as 'Chief Executive Officer of the City *and the City of San Diego Redevelopment Agency*'" (emphasis in original, footnote 5, p. 14).

The City Attorney's representatives have expressed concern about staff's "legal theory" that the CRL's provisions authorizing a city to enact a procedural ordinance recognize that a charter city should be allowed to adopt its own procedures. They have claimed that the 17 words of Health and Safety Code Section 33204 provide too slight a foundation upon which to build a case that the City may choose to make its Mayor the Executive Director for the RA. However, the City Attorney's September 28, 2005 opinion cites this precise section, which "states that '[a] chartered city may enact its own procedural ordinance and exercise the powers granted by this part'" (p. 4). The opinion goes on to indicate that the case of *Redevelopment Agency v. City of Berkeley* exempted a city's administrative actions from control by procedural ordinance. The procedural ordinance may not be used to "*regulate the powers*" delegated by the CRL (emphasis in original, p. 4). Does a provision requiring the RA to designate the Mayor as its Executive Director "usurp the legislative body's

authority to carry out the CRL" and thus violate state law (p. 4)? The City Attorney's argument that the Executive Director is not an independent sovereign clearly indicates that it does not (August 4, 2005 opinion). If a procedural ordinance does not violate the state law, then how could an identical charter provision do so? In terms of analogies, ordinances are to charters as statutes are to constitutions. If a city ordinance is permitted to do something, then by definition a charter provision must also be allowed to do it.

California has tried very hard to accommodate the many different cities of the state within the CRL. For example, a city may create a five- or a seven-member board for its redevelopment agency (California Health and Safety Code (CHSC) Section 33110) or even make its City Council the RA board (CHSC Section 33200). In 1977, the state stretched the fabric of the California Constitution by enacting special legislation to tailor the CRL to the needs of San Bernardino, and then revised the law further for that city's convenience in 1996.[3] The state has been willing to allow municipalities leeway in designating Relocation Appeals Boards to work with the RA, creating Community Redevelopment Commissions, contracting with the Department of Housing and Community Development, as well as permitting cities to combine their institutions and ordinances for state-authorized Housing Authority and Community Development functions with those for the RA (CHSC Sections 33417.5, 33201, 33206 and 34160, respectively). All of this would seem to indicate California's flexibility in applying the CRL to divergent cities.

The City Attorney has argued in other opinions that it is important to harmonize the provisions of state law with those of the City Charter. For example, the City Attorney's February 28, 2006 opinion on appointments to outside organizations actually contended that the City Charter trumps bylaws ratified pursuant to California's Corporations Code. Based on harmonizing the conflicting provisions of the state law and the city charter, the City Attorney opined that the Mayor should (with City Council confirmation) appoint the members of the Centre City Development Corporation (CCDC), San Diego Convention Center Corporation (SDCCC) and Southeast Economic Development Corporation (SEDC). The bylaws for all three of these city corporations had made the City Council the appointing authority. Moreover, the same opinion held that the Mayor must be given veto power over appointments to all eight of the other agencies for which controlling law vests appointment power in the Council or its President.[4] The state did not authorize the Mayor to veto any of these Council appointments, yet the City Attorney ruled that implementation of the controlling law must take account of the City Charter.

The attempt to reconcile charter provisions with state law before overriding is an integral part of the procedure that the United States courts have been devising ever

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[3] Compare the original version of Section 33200 of the California Health and Safety Code in its original 1963 form with its 1977 amended form (*The Statutes of California*, Chapter 420, pp. 1431-1433) and its 1996 amendment (*The Statutes of California*, Chapter 1119, pp. 8038-8040). The 1996 statute amending the section stated that "this special statute is necessary" although "a statute of general applicability" would be required under Article IV, Section 16 of the California Constitution: "(a) All laws of a general nature have uniform operation. (b) A local or special statute is invalid in any case if a general statute can be made applicable.

[4] The eight agencies are: Horton Plaza Theatres Foundation, Inc., Local Agency Formation Commission (LAFCO), Otay Valley Regional Park Policy Committee (JEPA), San Diego Metropolitan Transit System Board (MTS), San Diego River Conservancy, San Dieguito River Valley Regional Open Space Park Joint Powers Authority, San Diego Unified Port District, and the Local Enforcement Agency Hearing Panel, Waste Management.

since Dillon's Rule was issued in 1868. In fact, in this area of law, judges have generally expressed a desire to read charters perspicuously so that they are not required to overturn the will of the voters, as expressed in a city charter election (See *Johnson v. Bradley, op. cit*., p. 398). One such example of this fact comes from the recent experience of Oakland, California. Oakland recently transitioned from the Council-Manager to the Strong Mayor system, and faced a controversy very similar to that of San Diego in terms of its failure to specify the Mayor's role in redevelopment. If anything, the Oakland controversy was more problematic than San Diego's because the issue of conflict of interest arose in connection with the Mayor's role in redevelopment.

Mayor Jerry Brown was elected Mayor of Oakland in 1998, and successfully persuaded the voters to adopt Measure X, a Strong Mayor trial period very similar to San Diego's Prop F. Measure X did not clearly address how redevelopment should be handled, but did place the City Manager under the Mayor's control. Oakland's Municipal Code placed Redevelopment under a Director of the Community and Economic Development Agency, and placed the CEDA Director under the City Manager (Oakland Municipal Code Chapter 2.29.070)[5]. When the Strong Mayor form of government took effect, this placed the City Manager, and thus the director of the city's Redevelopment Agency, under the Mayor.

In Oakland, the Mayor apparently exercised redevelopment authority, although less directly than serving as Executive Director for the Oakland Redevelopment Agency: "the mayor serves as chief executive officer of the Redevelopment Agency of the City of Oakland. The agency is a separate legal entity organized under state law, but its governing structure mirrors the city's. The city council is the governing body of the redevelopment agency, and the city manager is the agency's administrator. The mayor does not serve on the agency's governing body, but as chief executive he directs the administrator" (*Brown v. Fair Political Practices Commission*, 84 Cal. App. 4th 137).

In his participation in Oakland's redevelopment process, Mayor Brown became involved in what potentially constituted a conflict of interest. He owned three parcels adjacent to or inside the Jack London Square redevelopment area that was under the control of Oakland's Redevelopment Agency. California's Fair Political Practices Commission opined that Mayor Brown's actions in regard to the redevelopment of that area would create a conflict of interest. The California Circuit Court of Appeals judged that the FPPC was incorrect, and that Oakland's Strong Mayor charter amendment mandated the Mayor's participation in redevelopment, even with this possible conflict of interest.

The *California Official Reports Headnotes* stated in regard to the outcome of the case: "The Fair Political Practices Commission (FPPC) erred in issuing an opinion

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[5] "Oakland's Municipal Code Chapter 2.29.070 on the Community and Economic Development Agency reads, in pertinent part: "There is established in the city government a Community and Economic Development Agency which shall be under the supervision and administrative control of the City Manager. The powers, functions and duties of said office and its departments shall be those assigned, authorized and directed by the City Manager. The management and operation of the Community and Economic Development Agency shall be the responsibility of the Director, subject to the direction of the City Manager. In the Community and Economic Development Agency there shall be the following divisions: Administration, Planning and Zoning, Building Services, Economic Development, Redevelopment, and Housing and Community Development."

under the conflict of interest provisions of the Political Reform Act of 1974 (Gov. Code, § 81000 et seq.) concluding that a mayor who owned property contiguous to a redevelopment area could not participate in decisions concerning the redevelopment project. The mayor came within the exception of Gov. Code, § 87101, providing that an official with a conflict of interest is not barred from joining in an action or decision if his or her participation is 'legally required for the action or decision to be made.' The FPPC claimed the city manager could perform the Mayor's function on the project. However, the central feature of a city charter amendment, overwhelmingly approved by the voters, was to make the city manager answerable to the mayor, who in turn is answerable to the voters. As to the redevelopment issue, the FPPC's opinion would prohibit the mayor from even attempting to act as the chief executive promised by the amendment. City government would effectively resume the power structure that existed under the former charter, which vested the city manager with broad administrative authority and prevented the mayor or the city council from interfering with the city manager's exercise of that authority. Such a result would be inconsistent with the charter in its present form and with the will of the voters. Thus, the mayor's participation in redevelopment projects, both in their proposal and in their implementation, was legally required for city government to function in the manner demanded by the charter."

In the worst-case scenario in which a city mayor actually owned properties affected by his exercise of his charter-mandated duties, the courts ruled in favor of the charter and overruled objections arising from state law. The Court of Appeals not only supported the addition of the Mayor to the Oakland redevelopment process, but did so even in a case where this required that the city charter trump the state's Political Reform Act and its provisions dealing with conflict of interest. It is difficult to imagine a case that would more decisively demonstrate the point the staff is making in this report.

The staff have reviewed the legislative history of the CRL, all opinions of the California Attorney General related to the CRL, a myriad of pertinent cases regarding the statewide concern versus municipal affairs test from 1890-present, as well as all San Diego City Attorney opinions on this issue that are on the City's website.[6] This research shows that the voters of the City of San Diego would be acting well within their rights by amending their Charter to provide that the Mayor shall act as Executive Director of the City of San Diego Redevelopment Agency.

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[6] The California Attorney General has opined upon redevelopment in a number of instances. The relevant opinions are *44 Ops. Cal. Atty. Gen. 170* (1964), 56 *Ops. Cal. Atty. Gen.* 519 (Opinion No. CV 73-163 (1973)), 57 *Ops. Cal. Atty. Gen.* 492 (Opinion No. CV 74-152 (1974)) and 67 *Ops. Cal Atty. Gen.* 459 (Opinion No. 83-1202 (1984)). In the last of these opinions, the Attorney General ruled: "where the city council has designated itself the community redevelopment agency a city councilman does not vacate his office when he ceases to discharge his duties as a member of that agency for three consecutive months." The Attorney General based this ruling in part upon the office's 1964 opinion that when the City Council designates itself as the Redevelopment Agency, "the members of the redevelopment agency governing board hold their position by virtue of their incumbency as city councilmen." This implies that the office of city council member, as established by a charter, is superior to that of redevelopment agency. Surely, it is absurd to contend that council members are primarily elected based on voters' expectations of their performance on the RA board!